

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR RAYMOND ROBLERO,

Defendant and Appellant.

E053949

(Super.Ct.No. RIF147194)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,  
Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Kevin Vienna and Warren J.  
Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was initially sentenced to serve 60 years to life in prison after a jury  
convicted him of committing numerous lewd acts on two young girls. Defendant

appealed and this court remanded for resentencing on two of the counts. In this current appeal, defendant argues the trial court violated the federal and state constitutions, and applicable case law and statutes, when it resentenced him to a new aggregate sentence of 62 years to life.<sup>1</sup> As discussed *post*, we disagree and affirm the judgment.

### **FACTS AND PROCEDURE<sup>2</sup>**

Jane Doe No. 1 was 13 years old when she testified at defendant's trial. She testified that she met defendant when she was about six years old, and he began touching her inappropriately "a little while" after that. Her mother eventually married defendant.

Jane Doe No. 2 was 18 years old when she testified at defendant's trial. She testified that defendant began touching her inappropriately when she was 12 or 13 years old. Her mother was close friends with Jane Doe No. 1's mother. Jane Doe No. 2 and her mother frequently visited Jane Doe No. 1 and her mother in the home they shared with defendant. When Jane Doe No. 2 was 17 years old, they moved into the home Jane Doe No. 1 and her mother shared with defendant.

In November 2008, both Jane Does reported the molestation to a third person. The three of them confronted defendant, but he just walked away. On November 23, 2008, a

---

<sup>1</sup> On two of the eight counts, defendant was originally sentenced to concurrent, 15-year-to-life terms. These indeterminate sentences were unauthorized by law as they should have been determinate terms of 16 months, two years or three years. On remand after defendant's first appeal, the trial court resentenced defendant on these two counts only, to a total of two years, to be served consecutive to the remaining indeterminate sentences.

<sup>2</sup> The facts and procedure are taken from the nonpublished opinion in the first appeal. (*People v. Roblero* (Sept. 7, 2010, E049749).)

sheriff's deputy conducted a recorded interview with defendant, during which defendant admitted inappropriate sexual conduct with both girls. The recording was played for the jury at trial.

The jury convicted defendant on all counts charged: counts 1 through 6—committing lewd acts on a child under 14 years old (Pen. Code, § 288, subd. (a));<sup>3</sup> count 7—nonforcible oral copulation on a child under 18 years old (§ 288a, subd. (b)(1)); and count 8—nonforcible sexual penetration on a child under 18 years old (§ 289, subd. (h)). The jury also found true the special circumstance as to each count that the case involved more than one victim. (§ 667.61, subd. (e)(5).)

Because of the special circumstance, the trial court sentenced defendant to a total of 60 years in prison as follows: consecutive sentences of 15 years to life on counts 1, 2, 4 and 5, and concurrent sentences of 15 years to life on counts 3, 6, 7 and 8. Defendant appealed.

On September 7, 2010, in a nonpublished opinion (*People v. Roblero, supra*, E049749), this court affirmed the judgment but vacated the sentences in counts 7 and 8. Those crimes are not listed in section 667.61, subdivision (c), as offenses that qualify for the special-circumstance, 15-year-to-life sentences under the statute. This court remanded the case to the trial court “for resentencing on these counts only.”

On June 10, 2011, the trial court resentenced defendant on counts 7 and 8. On count 7, the court sentenced defendant to a determinate term of two years (the midterm)

---

<sup>3</sup> All section references are to the Penal Code unless otherwise indicated.

because “there was sophistication in the manner in which these were carried out in terms of keeping them secret.” The court selected the same term for count 8, but made it concurrent with count 7. The court then made count 7 run consecutive to the indeterminate terms “because of the fact that there was such a large number of events and there was even the event that wasn’t charged in the hallway of Jurupa Valley High School and his overall conduct.” As directed by this court, the trial court did not resentence defendant on counts 1 through 6. The effect of this resentencing is that defendant must now serve a two-year determinate term for counts 7 and 8 before he may begin the 60-year-to-life indeterminate term for counts 1 through 6. This appeal followed.

## **DISCUSSION**

### *1. State Law*

Citing *People v. Henderson* (1963) 60 Cal.2d 482 (*Henderson*) and *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 (*Mustafaa*), defendant argues the sentencing court violated the state and federal prohibitions against double jeopardy when it imposed on remand an aggregate sentence greater than the sentence originally imposed. Citing *People v. Serrato* (1973) 9 Cal.3d 753 (*Serrato*), overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, footnote 1, the People respond that, because the original sentences on counts 7 and 8 were unauthorized by law, the trial court properly imposed the increased aggregate sentence on remand. As discussed *post*, we distinguish *Mustafaa*, conclude that the original sentences on counts 7 and 8 were unauthorized by law, and affirm the sentence imposed on remand.

In *Henderson*, *supra*, 60 Cal.2d 482, the defendant was convicted of first degree murder and sentenced to life imprisonment. Following reversal of that conviction, he was again convicted and the jury fixed the penalty at death. The California Supreme Court held that the California Constitution's guarantee against double jeopardy (art. I, former § 13) precluded the imposition of a more severe sentence upon retrial.

In *Serrato*, the California Supreme Court identified an exception to the state double jeopardy prohibition against increasing a prison term after an appeal. Distinguishing *Henderson*, in which the sentence imposed was a lawful one and the reversal was not due to sentencing error, the *Serrato* court stated: "The rule is otherwise when a trial court pronounces an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*Serrato*, *supra*, 9 Cal.3d at p. 764, fn. omitted.)

In *Mustafaa*, the trial court imposed consecutive terms for two gun use enhancements while running the terms for the crimes to which the enhancements were attached concurrent with the principal term. (*Mustafaa*, *supra*, 22 Cal.App.4th at p. 1309.) On appeal, the defendant successfully argued that this violated section 12022.5, subdivision (a), and the appellate court held that the matter must be remanded for resentencing. (*Mustafaa*, at p. 1311.) However, the appellate court concluded that the trial court had imposed "a legal aggregate sentence, only fashioning it in an unauthorized manner" and double jeopardy required that defendant receive no greater aggregate sentence upon remand. (*Id.* at pp. 1311-1312.)

Defendant acknowledges the *Serrato* exception to the *Henderson* rule,<sup>4</sup> but he argues the exception does not apply in this case. This is because, as in *Mustafaa*, the trial court here initially imposed a sentence of 60 years to life, which was legally authorized because it did not fall below the mandatory minimum sentence. Also as in *Mustafaa*, defendant argues the trial court fashioned this legally authorized sentence in a legally unauthorized manner because the sentence contained two unauthorized components—15-year-to-life terms for counts 7 and 8. However, because the court ran those sentences concurrent to the other counts, the unauthorized components did not impact the original, authorized, aggregate sentence. We disagree with this reasoning.

In the present case, the sentencing court improperly imposed enhanced, 15-year-to-life terms for counts 7 and 8 when, instead, the applicable statutes provide for only determinate terms of 16 months, two years, or three years. Thus, unlike *Mustafaa*, in which all of the terms were authorized by statute but they were imposed (i.e., consecutively vs. concurrently) in an unauthorized manner, two of the terms imposed in this case were simply not sanctioned by statute (i.e., 15 years to life vs. 16 months/two years/three years). Thus, the *Serrato* exception applies because the two 15-year-to-life terms at issue here were unauthorized by statute, so the sentencing court did not violate the state prohibition against double jeopardy when it resentenced defendant for these two terms on remand.

---

<sup>4</sup> Defendant does not cite *Serrato*, but rather cites to *People v. Hill* (1986) 185 Cal.App.3d 831, which also stands for the proposition that, “the rule against imposition of a harsher sentence on resentencing does not apply where the original sentence is unauthorized.”

At oral argument, counsel for defendant brought to our attention a case not previously cited in this matter, *People v. Torres* (2008) 163 Cal.App.4th 1420, in which the appellate court remanded to the trial court for resentencing with directions not to impose a sentence greater than originally imposed. We find this case distinguishable on its very specific facts, in that the appellate court concluded the sentence originally imposed was *not* legally unauthorized. In *Torres*, the trial court sentenced the defendant to what it thought<sup>5</sup> was the aggravated term of seven years for making criminal threats (§ 422), along with a stayed midterm sentence for dissuading a witness (§ 136.1, subd. (a)(2)). The opinion reports that the trial court “struck” the gang enhancements to these charges (§ 186.22, subds. (b)(4), (b)(1)(B)), one of which would have carried a term of seven years to life.<sup>6</sup> The Department of Corrections and Rehabilitation (the department) sent a letter to the trial court asking for clarification because the sentence imposed was higher than that allowed for making criminal threats. (*Torres*, at pp. 1421-1422.) Citing *People v. Hill*, *supra* 185 Cal.App.3d 831, the department advised the court, “When notified by the Department of Corrections and Rehabilitation that an illegal sentence exists, the trial court is entitled to reconsider all sentencing choices.” (*Torres*, at

---

<sup>5</sup> The People in its sentencing memorandum listed the sentencing range as three, five or seven years. The correct range, as contained in the probation report, was 16 months, two years or three years.

<sup>6</sup> In *People v. Campos* (2011) 196 Cal.App.4th 438, our colleagues in Division One criticize the *Torres* court for incorrectly describing and treating the punishment under section 186.22, subdivision (b)(4), as an enhancement rather than an alternate penalty. This difference is important because subdivision (g) allows the courts to strike the enhancements, but not the alternate penalties, in the interest of justice. (*Campos*, at pp. 448-450.)

p. 1427.) Defendant was returned to the trial court for resentencing. The trial court declined to dismiss the gang enhancements and imposed a sentence of seven years to life. The trial court cited *People v. Reyes* (1989) 212 Cal.App.3d 852, describing it as “set[ting] forth a well settled rule of law an illegal sentence [may be] corrected any time even if the new sentence is more severe than the original sentence.” (*Torres*, at p. 1428.)

In remanding the case for resentencing with directions not to impose a sentence greater than seven years, the appellate court stressed that “his original sentence fell within the legal range of sentence.” Accordingly, we distinguish *Torres* on the basis that, as the appellate court reasoned, the seven-year sentence was not strictly illegal because the trial court *could have* come up with that number legally by imposing the midterm of two years on the criminal threats conviction plus a consecutive five years on the gang “enhancement” for that count. The appellate court concluded that, because the seven year sentence “was therefore not a legally unauthorized lenient sentence,” the case most factually on point was *Mustafaa*, where the court fashioned a legally authorized sentence in a legally unauthorized manner. (*Torres, supra*, 163 Cal.App.4th at pp. 1432-1433.) For this reason, we distinguish *Torres* and find that it does not apply here.

## 2. *Federal Law*

Defendant also argues the trial court violated the federal standard against double jeopardy when it penalized him for exercising his right to appeal with an additional two years. In *North Carolina v. Pearce* (1969) 395 U.S. 711, 726, the United States Supreme Court held that, in order to assure that a sentence after retrial is not the product of vindictiveness, a judge who imposes a more severe sentence on retrial must state reasons



for doing so. The reasons must be based on objective information concerning identifiable conduct that occurred after the time of the original sentencing proceeding.

Here, the trial court on remand imposed the midterm of two years on count 7, and two years on count 8 to run concurrent with count 7. The court then stated the following to justify requiring defendant to serve the two years on count 7 consecutive to the 60-year-to-life indeterminate term, rather than concurrent with it: “So now the question is should it be concurrent or consecutive with the indeterminate terms. And because of the fact that there was such a large number of events and there was even the event that wasn’t charged in the hallway of Jurupa Valley High school and his overall conduct, I’m going to make it consecutive.” As defendant argues, the factors the trial court cited in choosing to run the two-year determinate sentence consecutive to the indeterminate sentence are not based on defendant’s conduct after the original sentencing. However, we are not convinced that *North Carolina v. Pearce* applies here at all.

First, that case involved two consolidated cases, in each of which the defendant received a more severe sentence following conviction for the *same* offense upon a complete retrial after the prior conviction had been set aside. The United States Supreme Court was concerned that allowing such an increased sentence on retrial for the same offense would violate the due process clause of the Fourteenth Amendment by allowing for the possibility of vindictiveness on the part of the trial court and would chill a criminal defendant’s exercise of his right to appeal. However, the exception set forth in

*Serrato* guards against this very concern expressed by the United States Supreme Court.<sup>7</sup> This is because the *Serrato* exception applies only to sentences that were unauthorized by law in the first place, and which, unlike a conviction, could have been challenged by either defendant or the People. Second, and in a similar vein, defendant provides no legal authority extending the reasoning in *North Carolina v. Pearce* to cases such as this one that do not involve a complete retrial, but rather a resentencing on two counts where the initial sentence was never authorized by law. As the appellant, defendant bears the burden of proving his point with relevant legal authority, and he has not done so here.

#### DISPOSITION

The 62-year-to-life sentence imposed on remand is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

MILLER

J.

---

<sup>7</sup> As our own Supreme Court, which fashioned the exception set forth in *Serrato* acknowledged, the minimum federal standards of double jeopardy protection are binding on state courts, which are also “free to delineate a higher level of protection under article I, section 15 (formerly § 13) of the California Constitution.” (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 510) This is yet another reason for our finding that applying the *Serrato* exception in this case answers the United States Supreme Court’s concerns regarding vindictiveness and the chilling of the exercise of appellate rights set forth in *North Carolina v. Pearce*.